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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.B. et al., Persons Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. C.C., Defendant and Appellant.	A125408, A125759 (Alameda County Super. Ct. Nos. HJ09011635; HJ09011636)

C.C., the mother of A.B. and A.J., appeals from the order denying her reunification services and from the order denying her petition to modify the order denying services. She contends that the court erred in bypassing reunification services pursuant to Welfare and Institutions Code[1] section 361.5, subdivision (e). We dismiss the appeals.

I. FACTUAL BACKGROUND

On January 6, 2009, a section 300 petition was filed alleging that: (1) mother failed to protect her daughters, A.B. and A.J.; (2) she had a history of physically abusing them; (3) she had a substance abuse problem that interfered with her ability to care for

[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

her daughters; (4) the minors were at substantial risk of suffering serious emotional damage in that A.B. had attempted suicide and was afraid of her mother and her mother's friends, who were reportedly Norteño gang members; and (5) one of mother's boyfriends raped A.B. and mother exposed the minors to adult sexual activity. The police arrested mother on multiple charges related to the sexual abuse incident and she was incarcerated at the Santa Rita jail. On January 7, 2009, the court ordered that the minors be detained and placed in foster care. On January 21, 2009, the minors were placed in the home of their maternal grandparents.

The preliminary hearing in mother's criminal case, alleging two counts of felony child abuse (Pen. Code, § 273a, subd. (a)) involving the minors, was held on February 4 and 5, 2009. A.B. testified. The court held defendant to answer to the two counts. On March 17, 2009, mother pled no contest to one count of felony child abuse. The court placed her on probation for five years on conditions including one year in the county jail which could be served in a residential drug treatment program. The court subsequently entered a criminal protective order prohibiting mother from having any contact with the minors or their maternal grandparents, and restraining her from coming within 100 yards of them. On April 21, 2009, mother was admitted to the Project Pride program. She was pregnant and due to deliver in September 2009.

A contested jurisdictional hearing commenced on March 23, 2009. The court admitted the Alameda County Social Services Agency's (Agency) jurisdiction/disposition report, an addendum report, the detention report, and the preliminary hearing transcripts from mother's criminal case that involved the underlying incident that led to the minors' detention. The parties stipulated that mother pled no contest to felony child abuse. The Agency's counsel argued that inasmuch as mother was convicted of felony child abuse in connection with the January 1, 2009, assault on A.B. that was the subject of one of the allegations of the section 300 petition, and mother had not contested the evidence respecting any of the other allegations of the petition, there was substantial evidence to support jurisdiction over both minors. The matter was continued for argument.

The matter was argued on April 20, 2009. The Agency argued that reunification services for mother should be bypassed pursuant to section 361.5, subdivision (b)(6) as a result of mother's sexual abuse of A.B., or to section 361.5, subdivision (e) due to mother's incarceration. Counsel for mother objected to the Agency's reliance on section 361.5, subdivision (b)(6) as a basis for bypass, arguing mother had not received notice from the Agency that it would rely on that provision and, thus, the court's reliance on subdivision (b)(6) would violate mother's due process rights.

The court sustained the allegations of the section 300 petition. It continued the matter to May 11, 2009, for a disposition hearing to allow time for briefing on the issue of whether the court, on its own motion, could order bypass under section 361.5, subdivision (b)(6) given that no specific notice was provided to mother on that issue.

On May 11, 2009, the court, relying on the section 361.5, subdivision (e) bypass provision, denied reunification services for mother. The court declared the minors dependents of the court and found, by clear and convincing evidence, that they were suffering severe emotional damage and that they had been sexually abused, or were at substantial risk of abuse, by a parent or other person known to the parent. The court ordered placement of the minors in the home of an approved relative. The court set the section 366.26 hearing for September 3, 2009.

Mother thereafter timely filed a notice of intent to file a writ petition, but she failed to file the writ petition. On June 24, 2009, this court dismissed the proceeding, noting that the deadline for filing a writ petition pursuant to California Rules of Court, rule 8.452 is mandatory. We further barred mother " 'in any subsequent appeal from making further challenges to the order setting a hearing under . . . section 366.26.' "

On July 2, 2009, a hearing was held to consider the Agency's interim review report. The Agency reported that it had located A.J.'s father. The court appointed counsel for A.J.'s father. On July 16, 2009, the Agency reported that it had found A.B.'s father; the court appointed counsel for him. Both fathers thereafter filed motions pursuant to section 388 requesting reunification services. Mother also filed a motion under section 388 requesting reunification services. The court set a hearing on the

fathers' motions for August 13, 2009. On August 3, 2009, the court summarily denied mother's motion, finding that the proposed change did not promote the best interests of the minors.

On August 13, 2009, the court found that D.B. was the presumed father of A.B. The court set aside the section 366.26 hearing and set the matter for a contested hearing on D.B.'s section 388 motion. The court held a separate hearing on the section 388 motion of C.J., A.J.'s father. The court granted C.J.'s motion, found him to be the presumed father of A.J., set aside the section 366.26 hearing, and ordered the Agency to provide C.J. with reasonable services.

Documents which we have judicially noticed[2] indicate that the court transferred A.B.'s case to Placer County.[3] On May 7, 2010, the juvenile court in Placer County dismissed A.B.'s case, case No. 53-002939, granting custody to D.B., and ordering that mother have no visitation.

The documents also include the Agency's February 9, 2010, status report concerning A.J., recommending that reunification services for C.J. be terminated as it was not substantially probable A.J. could be returned to him prior to the expiration of 18 months of removal, and that a section 366.26 hearing be set. The Agency's report noted that although C.J. was employed, maintained adequate housing, and had completed parenting classes, he was scheduled to be tried in March 2010 on a felony burglary charge.

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[2] We grant mother's request filed March 9, 2010, for judicial notice of certain documents that give the court current information concerning the children. (See *In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1422 [proper to augment record to include agency's postjudgment addendum report].)

[3] In a letter dated March 5, 2010, counsel for mother requests that the appeal pertaining to A.B. be severed from A.J.'s case in light of the transfer. We deny the request. (See *In re Lisa E.* (1986) 188 Cal.App.3d 399, 405 [declining to transfer case because any transfer of appeal would cause further delay and thwart the policy of expeditious resolution of juvenile cases].)

II. DISCUSSION

Mother contends that the court erred in bypassing reunification services pursuant to section 361.5, subdivision (e) because she was not incarcerated but rather was participating in a residential treatment program. We conclude mother is foreclosed from raising this issue on appeal because she failed to timely file a petition for extraordinary writ review of the court's order setting the section 366.26 hearing.

Mother acknowledges that she did not timely file a writ petition and that this court dismissed the proceeding, noting that "[t]he deadline for filing a writ petition pursuant to [California Rules of Court,] rule 8.452 is mandatory (*Roxanne H. v. Superior Court* [(1995)] 35 Cal.App.4th 1008, 1011-1012 [*Roxanne H.*])", and that she was barred in any subsequent appeal from making further challenges to the order setting the section 366.26 hearing. (See section 366.26, subd. (*l*) [orders setting a section 366.26 hearing are reviewable only by writ unless a writ was filed in a timely manner and summarily dismissed or otherwise not decided on the merits].) She argues, however, that the bar to appellate relief of section 366.26, subdivision (*l*) does not apply to her because the court vacated the section 366.26 hearing on August 13, 2009. This argument lacks merit.

The court set aside the section 366.26 hearing in response to the appearance of the minors' respective fathers in the proceeding. The court at no point indicated that it was reconsidering its position with respect to its orders relating to mother; indeed, the court summarily denied mother's section 388 motion approximately a week before it considered fathers' section 388 motions.[4] That the court entertained reunification of the minors with their fathers did not impact mother's right to review of the court's order bypassing reunification services. As the record makes clear, mother's obligation to seek writ review of the court's order expired on June 19, 2009. (*Roxanne H.*, *supra*, 35 Cal.App.4th at pp. 1010-1011, fn. 3; Cal. Rules of Court, rule 8.452(c)(1).) The

[4] Mother makes no arguments here that the court's August 3, 2009, order denying her motion pursuant to section 388 was in error. Accordingly, we deem her appeal from that order abandoned. (*In re Barbara R.* (2006) 137 Cal.App.4th 941, 949; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119-1120.)

court's subsequent orders regarding fathers' rights on August 13, 2009, did not result in mother having a second chance to seek appellate review.

"To secure the expeditious resolution of a challenge by extraordinary writ of an order for a section 366.26 hearing . . . [former] rule 39.1B prescribes numerous, successive time limits applicable to the initiation and progression of the writ proceeding . . . . All the time limits in the rule are mandatory." (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 721; *Roxanne H., supra,* 35 Cal.App.4th at p. 1012 ["when the Legislature has explicitly provided that the exclusive means for obtaining a decision on the merits on issues related to the order setting a section 366.26 hearing is to first file a *timely* petition for writ relief, we have no problem in finding that the time deadline for filing a petition should be construed as mandatory"].) Once the court set the section 366.26 hearing in mother's case, she was required to comply with the statute in order to seek review of the order. " 'The purpose of section 366.26, subdivision (*l*) is to ensure that error in the proceedings underlying the order setting a section 366.26 hearing does not fatally infect that hearing.' [Citation.] That purpose is carried out by an accelerated procedure designed to provide for the preparation of the record, briefing, and decision within 120 days, the statutory deadline for the setting of the section 366.26 hearing.' [Citations.]" (*John F. v. Superior Court* (1996) 43 Cal.App.4th 400, 407.) A timely petition would have allowed this court to remedy any errors committed by the juvenile court within the statutory time limits. It would be contrary to the statutory scheme to permit mother to challenge the setting of the section 366.26 order more than a year later.

Karl S. v. Superior Court (1995) 34 Cal.App.4th 1397, 1404, is also instructive. There, the court dismissed an untimely writ petition challenging the court's order that a section 366.26 hearing be held, rejecting the father's argument that the court's subsequent orders reconsidering and reaffirming its prior order terminating reunification services operated to reset the clock. "[Former r]ule 39.1B expressly provides that the order setting a hearing under section 366.26 triggers the requirement to file a notice of intent, not any other order or finding." (*Karl S.*, at p. 1404.)

Because mother failed to file a writ petition, this court may not consider her appeal from the trial court's order setting the section 366.26 hearing. Mother cannot circumvent section 366.26, subdivision (*l*) and obtain an appeal of the trial court's order by alleging trial counsel was ineffective in failing to file a writ petition in a timely fashion.

A claim of ineffective assistance of counsel must be brought by a writ of habeas corpus unless " 'there simply could be no satisfactory explanation' for trial counsel's action or inaction." (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1254, disapproved on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.) Mother has failed to meet that burden here. She cannot show that her counsel had no tactical reason for failing to timely file the writ petition. Further, counsel was well aware that mother was under a protective order restraining her from having any contact with the minors for five years. A writ petition challenging the court's order denying mother reunification services under these circumstances would have been futile. Mother simply cannot demonstrate prejudice from any action or omission of her trial counsel.

III. DISPOSITION

The appeals are dismissed.

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RIVERA, J.

We concur:

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REARDON, Acting P.J.

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SEPULVEDA, J.